GOLDMARK ENGINEERING INC.

IBLA 94-303 Decided January 7, 1997

Appeal from a decision of the Area Manager, Cody Resource Area, Wyoming, Bureau of Land Management, adjudicating a protest of the annual rental charges for a water injection well right-of-way. WYW-94130.

Affirmed.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   The holder of a right-of-way grant for a salt water disposal well is required to pay annually, in advance, the fair market rental value as determined by the authorized officer. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for nonlinear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels. An appraisal of fair market rental value of a nonlinear right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

2. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   A decision adjudicating an application for a reduction in the fair market rental value charged for a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1994), on the ground of hardship, pursuant to the regulation at 43 CFR 2803.1-2(b)(2)(iv), will generally be affirmed where the exercise of discretion was based on a reasoned consideration of relevant factors.

APPEARANCES: J. E. Lawrence, Vice President, Goldmark Engineering, Inc., Casper, Wyoming, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal was brought by Goldmark Engineering Inc. from a January 14, 1994, decision of the Area Manager, Cody Resource Area, Wyoming, Bureau of Land Management (BLM), adjudicating Goldmark's protest of the annual rental charges with respect to a water injection well right-of-way, WYW-94130. The annual rental for the right-of-way effective January 1, 1994, was set forth in a prior BLM letter of December 6, 1993, following appraisal of the right-of-way.

The right-of-way in this case was issued pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1994), with an effective date of August 18, 1986. The right-of-way is for a water pipeline and well site for injection of water produced from an oil well on a nearby oil and gas lease. The rental terms of the grant expressly provided that the initial rental rate ("$25/5 years minimum rental") was "subject to adjustment following appraisal" (Right-of-Way grant at ¶ 3).

Following completion of an appraisal of the comparable rental rate for a produced water injection well, BLM issued its December 6, 1993, letter to appellant announcing a rental rate of $0.05 per barrel of injected water. A rental of $500 per year was also set for surface facilities associated with the injection well, as well as a rental of $84 per year for the pipeline required to reach the injection well.

Goldmark protested the announced rental increase by letter dated December 17, 1993. The protest noted that the injection well was used for disposal of water produced from a stripper oil well on which the royalty had been reduced from 12.5 percent to 7.7 percent to enhance its economic viability.

In response to the protest, BLM issued the decision appealed from. Noting that the rental set represented the fair market rental value, BLM reduced the rental for elements of the right-of-way other than the pipeline by 40 percent, citing the regulation at 43 CFR 2803.1-2(b)(2)(iv), for as long as the reduced Federal royalty rate remains in effect.

In the statement of reasons for appeal, 1/ appellant quotes language from a Federal Register notice of August 11, 1992, explaining the basis for

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1/ Appellant erred in not filing its statement of reasons for appeal directly with this Board. The appeal regulations require that, if the notice of appeal did not include a statement of reasons for appeal, such a statement shall be filed with the Board. 43 CFR 4.412(a). Failure to file the reasons for appeal with the Board subjects the appeal to summary dismissal, 43 CFR 4.412(c), and that would have happened in this case except for the fact that a copy of the statement of reasons was received as an attachment to a filing by a third party.

the Department's determination to reduce royalty on stripper oil and gas wells to support production from marginal wells. Goldmark contends that the BLM decision was inconsistent with this policy even though it provided a 40-percent reduction in rental because it allowed a much higher rental than existed previously on this right-of-way. Appellant contends that to be consistent with this policy, the previous rental rate should have been reduced by 40 percent. Goldmark indicates it assumed that a change in rental fees as a result of appraisal would be tied to some type of price index. Noting the FLPMA requirement to charge the fair market rental value using sound business management principles and commercial practices, appellant argues that commercial practice would allow injection of water from a producing well in a disposal well owned by the same landowner without charge to secure the economic benefit of the producing well.

An answer has been filed on behalf of BLM noting that subsequent to issuance of the subject right-of-way it became apparent that the fair market rental value of an injection well is properly based on a per barrel charge for disposal rather than a simple charge for use of the associated linear right-of-way. Hence, it is contended the change in rental to reflect the BLM appraisal of this value is appropriate. With respect to the reduction in rental after BLM's decision adjudicating the protest, BLM contends this was a proper exercise of discretion as it is clear from information submitted by appellant that production from the well was still profitable.

[1] It is clear that under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal. Mallon Oil Co., 104 IBLA 145, 150 (1988); Harvey Singleton, 101 IBLA 248 (1988). Noting that the comparable lease method used by BLM in this case to determine the fair market rental value is the preferred method for appraisal when there is sufficient comparable rental data, this Board has upheld application of this method of appraisal to a right-of-way issued for an injection well for water disposal. Mallon Oil Co., supra at 151; see Laguna Gatuna, Inc., 121 IBLA 302 (1991); 43 CFR 2803.1-2(c)(3)(i) (rental for nonlinear right-of-way grants to be based on a market survey of comparable rentals). 2/ The appraisal report in the case file contains substantial support, based on the analysis of comparable leases for disposal of produced water, for the conclusion

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2/ Goldmark argues on appeal that Laguna Gatuna is distinguishable, however, it provides no analysis to support its assertion. While the right-of-way in that case was for a surface disposal site rather than an injection well, this difference is immaterial to the issues raised by this appeal and we find the Laguna case to be relevant to resolution of this appeal.

that the fair market rental value for produced water disposal (injection wells and evaporative pits) is $0.05 per barrel. Appellant has not asserted any error in the appraisal itself. An appraisal of fair market rental value of a nonlinear right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value. In the absence of a showing of error in the appraisal method used, a BLM appraisal may generally be rebutted only by another appraisal. Uno Broadcasting Corp., 120 IBLA 380 (1991); see Kelly E. Hughes, 135 IBLA 130 (1996); Laguna Gatuna, Inc., supra. Accordingly, the BLM appraisal of the fair market rental value must be affirmed.

[2] Appellant challenges the adequacy of the relief from the fair market rental value granted by BLM under the hardship exception in response to its protest. By rulemaking published in the Federal Register in 1987 the Department introduced a new provision at 43 CFR 2803.1-2(b)(2)(iv) authorizing a charge of less than fair market rental value in certain circumstances:

> (2) The authorized officer may reduce or waive the rental payment under the following instances:
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> (iv) With the concurrence of the State Director, the authorized officer, after consultation with an applicant/holder, determines that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental. In order to complete such consultation, the State Director may require the applicant/holder to submit data, information and other written material in support of a proposed finding that the right-of-way grant or temporary use permit qualifies for a reduction or waiver of rental * * *.

52 FR 25819 (July 8, 1987). It was explained in the preamble to the rulemaking that this provision was "added by the proposed rulemaking to cover unique hardship cases." 52 FR 25816 (July 8, 1987). The Board has upheld the application of this provision to existing rights-of-way. Mallon Oil Co., supra at 152. In the exercise of its discretion, BLM considered information provided by appellant and found in adjudicating the protest that it was in the public interest to reduce the fair market rental value by 40 percent. This Board will not ordinarily substitute its judgment for that of the authorized BLM official where the record reflects that the exercise of discretion was based on a reasonable consideration of the relevant factors. See Red Rock Hounds, Inc., 123 IBLA 314 (1992).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge